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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1360

LEO BRAMSON, ET AL., PETITIONERS

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 17a-34a) is reported at 346 F. Supp. 934. The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 485 F. 2d 1125.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1973. Mr. Justice Powell timely extended the time for filing a petition for a writ of certiorari to March 9, 1974, and the petition was filed on March 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a marketing order issued by the Secretary of Agriculture limiting the amount of celery produced in Florida that a handler of celery may market is contrary to the provision of the Agricultural Marketing Agreement Act of 1937 barring regulation of a producer "in his capacity as a producer."

2. Whether the marketing order was validly issued when the Secretary failed to consider asserted anticompetitive objections to the order which were not raised in the rulemaking proceeding and were not voiced by petitioners until long after the order had issued.

STATUTES AND REGULATIONS INVOLVED

7 U.S.C. 608b provides:

> *Marketing agreements; exemption from antitrust laws.*
>
> In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided,* that no such agreement shall remain in force after the termination of this chapter.

7 U.S.C. 608c provides in pertinent part:

> (6) In the case of the agricultural commodities and the products thereof * * * specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:
>
> * * * * *
>
> (B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.
>
> * * * * *
>
> (13) * * *
>
> (B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

Celery Marketing Order No. 967 is set forth in 7 C.F.R. Part 967.

STATEMENT

In 1962, A. J. Sullivan, a Florida celery producer, was given a marketing quota known as a base quantity under a state celery marketing order. After Sulli-

van incorporated his business as A. J. Sullivan of Florida, Inc. ("Sullivan Inc."), several individuals, including petitioners, formed a limited partnership called Chiglades Farm, Ltd., for the purpose of growing celery in a joint venture with Sullivan Inc. (R. 1280–1281). The joint venture agreement provided that Sullivan's marketing quota would be transferred to Sullivan Inc. (R. 1273–1277).

In May 1965, the Supreme Court of Florida held that the state celery marketing order and portions of the state statute exceeded the scope of the state's police power, and therefore violated both the state and federal constitutions. *Rabin* v. *Conner*, 174 So. 2d 721. Subsequently, the Secretary of Agriculture commenced appropriate rulemaking proceedings for the purpose of considering and formulating a federal marketing agreement and order for the handling of celery under the Agricultural Marketing Agreement Act of 1937. 30 Fed. Reg. 8648. Marketing Order No. 967, promulgated after public hearings were held, became effective in November 1965. 30 Fed. Reg. 14266.

Under the federal order and a concomitant marketing agreement, a Florida Celery Committee, composed of producers[1], employees of producers, handlers,[2] or employees of handlers (7 C.F.R. 967.26),

[1] A "producer" is a person engaged in a proprietary capacity in the production of celery. 7 C.F.R. 967.6.

[2] A "handler" is a person who, on behalf of himself or a producer of celery, "handles" harvested celery, *i.e.*, purchases harvested celery from a producer or sells or transports harvested celery within Florida or from Florida to points outside Florida. 7 C.F.R. 967.5, 967.7, 967.8.

recommends to the Secretary the total amount of celery to be marketed in a current season. If the Secretary finds that limitation of the total amount of celery to be "handled" (see p. 4, *supra,* n. 2) in a marketing season (or revision of a previously established limitation) would tend to effectuate the policy of the Act, then the Secretary may limit (or revise the existing limitation on) the total quantity of celery that handlers may handle, as the first handler thereof, for the current season. 7 C.F.R. 967.36 (a). This total quantity that may be handled in a current season is referred to as the "Marketable Quantity." 7 C.F.R. 967.13. The Committee then allocates the Marketable Quantity by giving each producer a "Marketable Allotment" for the season, which constitutes the maximum amount of harvested celery that may be purchased from, or handled on behalf of, that producer. 7 C.F.R. 967.14, 967.38(a), (b). No limitation is imposed on the amount of celery that a producer may produce or harvest.

The Marketable Allotment of a producer is determined by reference to the "Base Quantity" of the producer (7 C.F.R. 967.38(a), (b)), which is itself determined by reference either to the amount of harvested celery sold by the producer during the seasons from 1958 to 1965, or, in the case of producers whose sales were nonexistent or unrepresentative during that period, to firm and substantial commitments made prior to September 30, 1965, for the production of celery. 7 C.F.R. 967.37(b).

Sullivan Inc. applied for and received a Base Quantity under the federal order. Although Chiglades was sent a separate application form, it did not apply for a Base Quantity, but continued to participate in the joint venture under a new agreement specifying that the venture would operate under Sullivan Inc.'s Base Quantity (R. 1764, 1766).

Chiglades terminated the joint venture in 1967. Beginning in May 1967, Chiglades requested in a series of administrative applications that it be awarded a Base Quantity of its own. After hearings the applications were denied.

Petitioners then filed this action (in the United States District Court for the District of Columbia, which transferred it to the United States District Court for the Southern District of Florida), seeking the assignment to Chiglades of a permanent Base Quantity on the basis of its alleged production history. Alternatively, petitioners urged that the 1965 marketing order and agreement, both on their face and as applied, were unconstitutional and also violated the Agricultural Marketing Agreement Act and the antitrust laws. The district court granted summary judgment for the Secretary, holding (1) that the order and agreement are constitutional, (2) that they are not contrary to the Marketing Agreement Act, and (3) that there was no violation of the Sherman Act because the Marketing Agreement Act specifically provides that marketing agreements approved by the Secretary do not violate the antitrust laws. 7 U.S.C. 608b. The court of appeals affirmed (Pet. App. 1a–16a).

ARGUMENT

1. Petitioners contend that the allotment of Base Quantities limiting the amount of celery that a producer may sell to a handler violates 7 U.S.C. 608c(13)(B), which prohibits the Secretary from issuing any marketing order applicable to a producer "in his capacity as a producer."

Under 7 U.S.C. 608c(6)(B), among the limited number of conditions that the Secretary must consider for inclusion in a marketing order are conditions

> [a]llotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers * * *.

This language specifically authorizes the Secretary to allot the amount of a commodity that may be purchased by handlers from producers. The base quotas in issue here are precisely such allotments.[3]

When subsections (6)(B) and (13)(B) of 7 U.S.C. 608c are read together, as they must be (*Federal Power Commission* v. *Panhandle E. Pipeline Co.*,

[3] The Florida state court decision in *Rabin* v. *Conner*, 174 So. 2d 721, has no application here. The Florida court held that the statutory scheme constituted an unwarranted exercise of the state's police power, and a denial of due process. *Rabin* has no bearing on the power of the federal government to regulate the marketing of agricultural commodities under the Commerce Clause of the Constitution, nor on whether the Secretary's exercise of the powers conferred by Congress was consistent with applicable Acts of Congress.

337 U.S. 498, 514), the statute authorizes regulation of the amount which a producer may *sell* to a handler, but prohibits restriction on the amount a producer may *grow*. See *Cranberry Prods., Inc.* v. *Hardin*, No. 71-C-139 (W.D. Wis.), decided October 16, 1972.

The distinction between production and marketing was recognized in *Mulford* v. *Smith*, 307 U.S. 38, where it was alleged that the Agricultural Adjustment Act of 1938 imposed improper controls on the production of tobacco. Under that Act, a quota was apportioned to the farms on which the tobacco was grown. Penalties were placed on warehousemen who marketed tobacco from a farm in excess of the farm's quota. In upholding this statutory scheme, the Court held (307 U.S. at 47):

> The statute does not purport to control production. It sets no limit upon acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce—the marketing warehouse.

Thus, control of the celery market through limitations on the amount of celery handlers may purchase is in full accord with the statutory authority in Section 608c(6).

Petitioners' argument that the Agricultural Marketing Agreement Act may not be applied so as to affect producers indirectly is based on a misreading of 7 U.S.C. 608c(13)(B). That section provides that mar-

keting orders may not apply to a producer "in his capacity as a producer." The effect of this provision is not to bar regulation of producers in the *sale* of their product but only in its production. Petitioners' broader interpretation of this provision would render the entire marketing agreement program virtually unworkable, for almost any effort to implement the policy of the Marketing Agreement Act of establishing such orderly marketing conditions as will establish parity prices to farmers (7 U.S.C. 602(1))[4] will necessarily have some effect upon producers.

The history and evident purpose of Section 608c (13)(B) indicates that it should not be given an expansive application. The provision first appeared in the Agricultural Adjustment Act Amendments of 1935 (Section 5, 49 Stat. 753), which replaced a provision for licensing of handlers established by Section 8(3) of the Agricultural Adjustment Act of 1933 (48 Stat. 35) with the present system of marketing orders. (The 1935 amendment was "validated" and reenacted without material change in the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), as "not having been intended for the control of the production of agricultural commodities," after this Court had held other parts of the Act unconstitutional. See *United States* v. *Butler*, 297 U.S. 1.)

[4] Section 602(1) provides that it is the policy of Congress, [t]hrough the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

The legislative history of the 1935 amendment indicates that Congress intended to vest the Secretary with "the full extent of the Federal power over interstate and foreign commerce and no more * * * in connection with [marketing] orders." H. Rep. No. 1241, 74th Cong., 1st Sess., p. 8; S. Rep. No. 1011, 74th Cong., 1st Sess., p. 9; see *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 124–125. That history contains no evidence that Section 608c(13)(B) was intended to protect "producers" from regulation as a matter of policy. Rather, the provision that no order should apply to a producer "in his capacity as a producer" was nothing more than an effort to tailor the statute to then-prevailing notions as to the limits on the commerce power, under which it was thought that Congress could not "regulate agricultural production." *United States* v. *Butler, supra*, 297 U.S. at 68; see *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 542–550; *Hammer* v. *Dagenhart*, 247 U.S. 251, overruled in *United States* v. *Darby*, 312 U.S. 100; cf. *Mulford* v. *Smith, supra*, 307 U.S. at 47–48. See also *Wickard* v. *Filburn*, 317 U.S. 111, sustaining Congress' power to regulate local agricultural production in the course of the regulation of interstate commerce. Given Congress' express intention to vest the Secretary with the full power over commerce, Section 608c(13)(B) must be regarded as providing, in substance, that marketing orders shall not affect producers in their capacity as producers if to do so would

exceed Congress' power over commerce, a claim which cannot plausibly be made here.[5]

2. Petitioners also contend that Marketing Order No. 967 and the related marketing agreement are invalid because in approving them the Secretary failed to consider their alleged anticompetitive effects of perpetuating control over celery production in Florida by a small group of producers and preventing new producers from entering the market.[6] Petitioners, however, did not raise these antitrust contentions in the rulemaking proceedings that preceded the adoption of the marketing order.[7] The Secretary has advised us that had those contentions then been presented, they would have been considered. In the circumstances, we

[5] The dictum in *Stark* v. *Wickard*, 321 U.S. 288, 303, cited by petitioners (Pet. 10), is not to the contrary. There the Court held only that producers of milk had standing to challenge an order of the Secretary making certain deductions from the minimum prices due to milk producers selling to handlers covered by the order, pursuant to 7 U.S.C. 608c(5). As Justice Frankfurter noted in his dissent, "[o]f course the statute concerns the interests of producers * * *," notwithstanding Section 608c(13)(B). 321 U.S. at 316.

[6] The marketing order in fact authorizes the Committee and the Secretary to set aside a reserve for persons who have no Base Quantity. 7 C.F.R. 967.37(d). Such a reserve has not yet been set aside, however, because, due to an excess of supply over demand, the total Base Quantities have exceeded the Marketable Quantity each season. *E.g.*, 38 Fed. Reg. 22371.

[7] Petitioners have not brought before the courts in this case the record of the 1965 rulemaking proceeding that resulted in adoption of the challenged marketing order and agreement. We are advised by the Secretary, however, that the antitrust objections now being voiced by petitioners were not raised in that proceeding by petitioners or by anyone else. The Secretary's order does reflect consideration of a variety of other competitive factors. 30 Fed. Reg. 14266.

submit that petitioners cannot now be heard to complain about the Secretary's failure to consider the alleged anticompetitive effects of the order.

Petitioners apparently were quite satisfied with the restrictive aspects of the marketing order as long as they were able, through their joint venture with Sullivan Inc., to enjoy the protections it conferred against additional competition. Having enjoyed the benefits of that order, petitioners are in a poor position now to contend that it was invalidly issued. Cf. *Arnett* v. *Kennedy*, No. 72–1118, decided April 16, 1974, slip op. 17–18 (opinion of Mr. Justice Rehnquist); *Fahey* v. *Mallonee*, 332 U.S. 245, 255–256.

Petitioners may at any time request the Secretary to reconsider and amend the marketing order to take account of its alleged anticompetitive effects. See 7 U.S.C. 608c(2)–(4), (17); 5 U.S.C. 553(e).[8] Thus far they have not done so. They cannot, however, at this point properly challenge the Secretary's issuance of that order nine years ago because of his failure to consider certain alleged anticompetitive effects—an issue that was not raised before him. Indeed, under 7 U.S.C. 608c(4), the Secretary was required to base his issuance of the order upon the evidence introduced at the hearing.

The cases upon which petitioners rely (Pet. 12–13), in which this Court held that an agency was required to consider antitrust issues in passing upon a proposed

[8] In judicial review following such an attempt to obtain modification of the order (if unsuccessful), the courts would presumably have the benefit of a more complete and appropriate record of the rulemaking proceeding than is before the courts in this case.

transaction under public interest standards, were all situations in which, unlike the present case, the antitrust points had been properly raised before the agency. We know of no decision of this Court holding that, even where an antitrust issue has not been raised before the agency, the latter's failure itself to consider it is a reason for invalidating the agency's action.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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